

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF CALIFORNIA

3  
4 IN RE: INCRETIN-BASED  
5 THERAPIES PRODUCTS  
6 LIABILITY LITIGATION

7 *This Document Relates to All Cases*

Case No. 13-md-2452-AJB-MDD

CASE MANAGEMENT ORDER  
REGULATING DISCOVERY AND  
OTHER PRETRIAL PROCEEDINGS  
CONCERNING BYETTA CASES

Judge: Hon. Anthony J. Battaglia  
Magistrate: Hon. Mitchell D. Dembin

10 After reviewing the Parties Motion regarding the entry of a case  
11 management order regulating discovery and other pretrial proceedings, and  
12 the Parties' proposed Order related thereto, and for good cause appearing,  
13

14 **IT IS HEREBY ORDERED:**

15 1. On or before **April 4, 2014**, the PSC, Amylin Pharmaceuticals,  
16 LLC f/k/a Amylin Pharmaceuticals, Inc., and Eli Lilly and Company (the  
17 "Parties") shall submit to the Court a proposed Case Management Order  
18 identifying the exact process, timing, and other parameters for selecting and  
19 trying bellwether cases. The first two bellwether trials shall be on the dates  
20 discussed herein and will solely involve claims related to use of Byetta.<sup>1</sup>

21 2. All Plaintiffs who have served their Plaintiff Fact Sheet by **May**  
22 **16, 2014** will be part of the bellwether eligible pool of cases<sup>2</sup>, unless Counsel  
23 for any such Plaintiff notifies Defendants' counsel on or before **May 23, 2014**  
24 that a particular Plaintiff is unable or otherwise unwilling to serve as a

25 <sup>1</sup> To the extent that deadlines in this CMO conflict with deadlines provided in previous case  
26 management orders, the deadlines provided for herein shall control.

27 <sup>2</sup> In light of the extremis nature of many of the Plaintiffs in this MDL, the Court will allow the  
28 PSC to put forth later filed Plaintiffs and/or substitute bellwether discovery selections to ensure  
Plaintiffs are able, if they so choose, to put forth representative Plaintiffs who will be able to  
testify live at trial.

1 bellwether trial plaintiff.

2 3. On or before **September 1, 2014**, the Parties shall identify in  
3 writing six (6) representative<sup>3</sup> Plaintiffs, or three (3) bellwether candidates  
4 per side, that shall serve as bellwether discovery plaintiffs. The process and  
5 mechanisms of designations and selections of bellwethers shall be done in  
6 accordance with the CMO that is submitted on or before April 4, 2014, as set  
7 forth in paragraph 1, above.

8 4. Between **September 1, 2014** and **March 13, 2015**, case-specific  
9 bellwether discovery shall take place, with a maximum of five (5)  
10 depositions per side for each case. Discovery of Plaintiffs beyond these  
11 depositions as part of case-specific core discovery may be permitted only  
12 upon agreement of the parties or with leave of Court for good cause shown.

13 5. All non case-specific fact discovery shall be completed on or  
14 before **March 13, 2015**. "Completed" means that all discovery under Rules  
15 30-36 of the Federal Rules of Civil Procedure, and discovery subpoenas  
16 under Rule 45, must be initiated a sufficient period of time in advance of the  
17 cut-off date, *so that it may be completed* by the cut-off date, taking into  
18 account the times for service, notice, and response as set forth in the Federal  
19 Rules of Civil Procedure. All disputes concerning fact discovery shall be  
20 brought to the attention of the Magistrate Judge no later than sixty (60) days  
21 following the date upon which the event giving rise to the dispute occurred  
22 or otherwise became apparent, unless the parties agree otherwise or for  
23 good cause shown. Counsel are required to meet and confer regarding all  
24 discovery disputes pursuant to the requirements of Local Rules 16.5(k) and  
25 26.1(a).

26  
27 <sup>3</sup> The Parties shall endeavor to meet and confer on the general criteria/parameters that constitute a  
28 representative plaintiff, and further, each Party shall then work in good faith to select  
representative bellwether discovery plaintiffs who meet those general parameters.

1           6. On or before **March 20, 2015**, each Party shall provide the Court  
2 with their respective, specified number of bellwether cases from which the  
3 bellwether trial cases will be selected as is required in the CMO that will be  
4 submitted on April 4, 2014, as set forth in paragraph 1, above.

5           7. On or before **April 1, 2015**, the Court will select two (2) cases to  
6 serve as the early bellwether trial cases for the Parties subject to this Order  
7 and will designate the order of such bellwether trials. The Court shall select  
8 the first case tried from the bellwether selections submitted by the PSC. The  
9 Court may, in its sole discretion, choose the second case tried from  
10 bellwether plaintiffs submitted by either of the PSC or Defendants.  
11 Moreover, the plaintiff chosen for the Parties second bellwether trial shall  
12 act as a 'back-up' trial plaintiff to the Parties first trial setting. A third  
13 bellwether plaintiff will be selected by the Court to further act as a 'back-up'  
14 trial plaintiff to the Parties second trial setting. To the extent possible, at the  
15 election of the PSC, the first bellwether trial shall involve a Plaintiff who is  
16 then living and able to testify in person or by live video feed at trial.

17           8. After the Court selects the first two (2) bellwether trial cases, the  
18 parties shall designate additional fact witnesses who may be called as  
19 witnesses in such trials on or before **April 15, 2015**. Depositions of such fact  
20 witnesses, not previously deposed during the case-specific core discovery,  
21 shall take place on or before **May 29, 2015**. No more than three (3)  
22 additional case specific fact witness depositions per side shall be permitted  
23 without a showing of good cause. Further discovery as to the third  
24 bellwether Plaintiff selected by the Court as a 'back-up' will be stayed  
25 pending further order of the Court, or as otherwise agreed by the Parties.

26           9. All expert disclosures required by Fed. R. Civ. P. 26(a)(2) shall  
27 be served on all parties on or before **May 1, 2015**. Any contradictory or  
28 rebuttal disclosures within the meaning of Rule 26(a)(2)(D)(ii) shall be

1 disclosed on or before **June 1, 2015**. Unless otherwise stipulated by the  
2 parties, the required expert disclosures shall include an expert report as  
3 required by Rule 26(a)(2)(B). If a written report is not required, the  
4 disclosure must provide the information required under Rule 26(a)(2)(c),  
5 unless the parties agree otherwise. Case specific expert reports, if required,  
6 will be dealt with in the CMO that will be submitted on April 4, 2014, as set  
7 forth in paragraph 1, above.

8 10. Each expert designation shall include at least two available  
9 dates when each expert can be tendered for deposition. The Parties shall  
10 work cooperatively and in good faith to provide alternate dates upon  
11 request.

12 11. All expert discovery shall be completed by the Parties on or  
13 before **July 1, 2015**. "Completed" means that all discovery under Rules 30-  
14 36 of the Federal Rules of Civil Procedure, and discovery subpoenas under  
15 Rule 45, must be initiated a sufficient period of time in advance of the cut-  
16 off date, so that it may be completed by the cut-off-date, taking into account  
17 the times for service, notice, and response as set forth in the Federal Rules of  
18 Civil Procedure. All disputes concerning expert discovery shall be brought  
19 to the attention of the magistrate Judge no later than forty-five (45) days  
20 following the date upon which the event giving rise to the dispute occurred  
21 or otherwise became apparent, unless the Parties agree otherwise or for  
22 good cause shown. Counsel are required to meet and confer regarding all  
23 discovery disputes pursuant to the requirements of Local Rules 16.5(k) and  
24 26.1(a).

- 25 a. The parties intend that the limitations on expert discovery set  
26 forth in Rule 26 of the Federal Rules of Civil Procedure,  
27 including the provision of Rule 26(b)(4)(A)-(D) limiting  
28 discovery with respect to draft reports, communications with

1 experts, and depositions of consulting experts, shall apply to all  
2 cases, whether pending in state or federal court.

3 12. All other dispositive motions, including those addressing  
4 Daubert issues, must be filed on or before **July 31, 2015**. Please be advised  
5 that counsel for the moving party must obtain a motion hearing date from  
6 the law clerk of the judge who will hear the motion. Any hearings on  
7 dispositive motions, including those addressing Daubert issues, must be set  
8 on or before **October 1, 2015**. Motions in Limine are to be filed as directed in  
9 the Local Rules, or as otherwise set by Judge Battaglia.

10 a. Summary Judgment Motions and/or Daubert Motions need not  
11 be filed, and the Court encourages the parties to file meritorious  
12 motions rather than motions for "the sake of motions." The  
13 Court will consider awarding costs and expenses to any Party  
14 who prevails on what the Court considers to be a Summary  
15 Judgment Motion and/or Daubert Motion filed against a Party  
16 that appears to have been filed for "the sake of motions."

17 b. Questions regarding this case should be directed to the Judge's  
18 law clerk. The Court draws the parties' attention to Local Rule  
19 7.1(e)(4) which requires that the parties allot additional time for  
20 service of motion papers by mail. Papers not complying with  
21 the rule shall not be accepted for filing.

22 c. Responses to Summary Judgment Motions and or Daubert  
23 Motions, if any, shall be filed on or before **September 2, 2015**.  
24 Replies to responses are discouraged by the Court, but if  
25 necessary to address new issues raised in a response, may be  
26 filed within five (5) days after the response to which it replies  
27 upon leave of Court with the proposed reply attached thereto.

28 d. Briefs or memoranda in support of or in opposition to any

1 pending discovery motion shall not exceed twenty-five (25)  
2 pages in length without leave of the judge who will hear the  
3 motion. No reply memorandum shall exceed ten (10) pages  
4 without leave of the judge who will hear the motion. The Court  
5 will set special page limits after conferring with the Parties in  
6 the future in relation to Daubert issues.

7 13. On or before **March 2, 2015**, the Parties will each designate  
8 settlement counsel(s) to be the primary contact(s) for settlement discussions  
9 and agree on a Mediator to facilitate settlement negotiations. In the event  
10 the parties are not able to agree on a Mediator, they will notify the court  
11 jointly on or before **March 27, 2015**, through a single, joint letter requesting  
12 the designation of a Mediator by this Court. Such letter shall not exceed two  
13 pages in length, and may identify up to three proposed Mediators proposed  
14 by each side.

15 14. Beginning on or before **April 17, 2015**, the Parties shall meet and  
16 confer at least one time per month to discuss settlement. Initial conferences  
17 may take place in person, via videoconference, or by other means at the  
18 Parties' discretion, provided the designated Mediator is a part of at least one  
19 such communication per month. No later than **June 19, 2015**, at least one in-  
20 person session shall have taken place at a site mutually agreed upon by the  
21 Parties. Thereafter, negotiations may continue either in person or as agreed  
22 to by the Parties and the Mediator. Settlement conferences shall not include  
23 any Defendants other than the Parties to this Order unless otherwise agreed  
24 by the PSC and all Defendants in MDL 2452.

25 15. The mediator and settlement counsel for the Parties may, in the  
26 Court's discretion, be asked to report to the Court on the status of  
27 settlement discussions. Nothing in this Order is intended to limit the  
28 Parties' abilities to engage in additional settlement negotiations.

1           16. Furthermore, after expert reports are exchanged and depositions  
2 of experts are taken, if any, as well as any good faith Rule 702 motions are  
3 filed, the Parties shall meet with the Mediator for purposes of convening  
4 focus groups to further settlement negotiations and to attempt to arrive at  
5 settlement values. At the conclusion of the focus groups, the Parties shall  
6 engage in good faith mediation with the Mediator who shall be given full  
7 authority to use every means at his disposal to engage the Parties in an  
8 effort to settle the litigation before the first bellwether trial begins. The  
9 Parties shall share the expenses of the focus groups and Mediator equally.  
10 The focus groups contemplated herein shall be completed on or before  
11 **August 14, 2015**; and further, the good faith mediation with the Mediator  
12 following the focus groups shall be completed on or before **August 21, 2015**.  
13 Focus groups shall not include any Defendants other than the Parties to this  
14 Order unless otherwise agreed by the PSC and all Defendants in MDL 2452.

15           17. A final Mandatory Settlement Conference shall be conducted on  
16 **September 4, 2015 at 10:00 a.m.** in the chambers of Magistrate Judge  
17 Mitchell Dembin. The appointed Mediator shall attend this mediation  
18 session along with Judge Dembin. The Parties shall share the fees and  
19 expenses of the Mediator equally. Counsel shall submit **confidential**  
20 settlement statements **directly** to Magistrate Judge Dembin's chambers no  
21 later than **August 28, 2015**.

- 22           a. Each party's settlement statement shall set forth the party's  
23 statement of the case, identify controlling legal issues, concisely  
24 set out issues of liability and damages, and shall set forth the  
25 party's settlement position, including the last offer or demand  
26 made by the party, and a separate statement of the offer or  
27 demand the party is prepared to make at the settlement  
28 conference. **The settlement conference briefs shall not be filed**

1           **with the Clerk of the Court, shall be confidential, and shall**  
2           **not be shared with or served upon any other Party.**

3           b. All claims adjusters for insured defendants and representatives  
4           with complete authority to enter into a binding settlement, as  
5           well as the principal attorney(s) responsible for the litigation,  
6           must be present and legally and factually prepared to discuss  
7           and resolve the case at the Mandatory Settlement Conference.  
8           Outside retained corporate counsel shall not appear on behalf of  
9           a corporation as the party who has the authority to negotiate  
10          and enter into a settlement. **All conference discussions will be**  
11          **informal, off the record, privileged, and confidential.**

12          c. The Mandatory Settlement Conference shall not include any  
13          Defendants other than the Parties to this Order unless otherwise  
14          agreed by the PSC and all Defendants in MDL 2452.

15          18. No Memorandum of Law or Contentions of Fact are to be filed.

16          19. The parties must comply with the pretrial disclosure  
17          requirements of Fed. R. Civ. P. 26(a)(3) no later than **September 16, 2015**.  
18          The parties should consult Fed. R. Civ. P. 26(a)(3) for the substance of the  
19          required disclosures.

20          a. **Please be advised that failure to comply with this section or**  
21          **any other discovery order of the Court may result in the**  
22          **sanctions provided for in Fed. R. Civ. P. 37, including a**  
23          **prohibition on the introduction of designated matters in**  
24          **evidence.**

25          20. The parties must meet and confer on or before **September 23,**  
26          **2015**, and prepare a proposed pretrial order containing the following:

27          a. A joint neutral statement to be read to the jury, not in excess of  
28          two pages, of the nature of the case and the claims and defenses.



- 1 b. A list of the causes of action to be tried, referenced to the  
2 Complaint (and Counterclaim if applicable). For each cause of  
3 action, the order shall succinctly list the elements of the claim,  
4 damages and any defenses. A cause of action in the Complaint  
5 (and/or Counterclaim), which is not listed, shall be dismissed  
6 with prejudice.
- 7 c. A list, in alphabetical order, of each witness counsel actually  
8 expects to call at trial with a brief statement, not exceeding four  
9 sentences, of the substance of the witnesses' testimony.
- 10 d. A list, in alphabetical order, of each expert witness counsel  
11 actually expect to call at trial with a brief statement, not  
12 exceeding four sentences, of the substance of the expert  
13 witnesses' testimony.
- 14 e. A list, in alphabetical order, of additional witnesses, including  
15 experts, counsel do not expect to call at this time but reserve the  
16 right to call at trial along with a brief statement, not exceeding  
17 four sentences, of the substance of the witnesses' testimony.
- 18 f. A list of all exhibits that counsel actually expect to offer at trial  
19 with a one-sentence description of the exhibit.
- 20 g. A list of all exhibits that counsel do not expect to offer at this  
21 time but reserve the right to offer if necessary at trial with a one-  
22 sentence description of the exhibit.
- 23 h. A statement of all facts to which the parties stipulate. This  
24 statement must be on a separate page and will be read to and  
25 provided to the jury.
- 26 i. A list of all deposition transcripts by page and line, or videotape  
27 depositions by section, that will be offered at trial. Over  
28 designation is discouraged and may result in sanctions.

1           j. An estimate for the length of trial.

2           The Court encourages the parties to consult with the assigned  
3 magistrate judge to work out any problems in preparation of the proposed  
4 pretrial order, or to discuss necessary modifications to the above  
5 requirements. The Court will entertain any questions concerning the  
6 conduct of the trial at the pretrial conference or by later order.

7           21. The proposed final pretrial conference order, including written  
8 objections, if any, to any party's Fed. R. Civ. P. 26(a)(3) pretrial disclosures,  
9 shall be prepared, served, and submitted to the Clerk's Office on or before  
10 **October 2, 2015** and shall be in the form prescribed in and in compliance  
11 with Local Rule 16.1(f)(6). Any objections shall comply with the  
12 requirements of Fed. R. Civ. P. 26(a)(3). **Please be advised that the failure**  
13 **to file written objections to a party's pretrial disclosures may result in the**  
14 **waiver of such objections, with the exception of those made pursuant to**  
15 **Rule 402 (relevance) and 403 (prejudice, confusion or waste of time) of the**  
16 **Federal Rules of Evidence.**

17           22. The final pretrial conference is scheduled on the calendar of the  
18 **Honorable Anthony Battaglia October 21, 2015 at 9:00 a.m.**

19           23. The trial schedule will begin with the first bellwether trial on  
20 **November 2, 2015**, and the second bellwether trial shall begin thereafter on  
21 **February 1, 2016.**

22           24. The dates and times set forth herein will not be modified except  
23 for good cause shown.

24  
25 DATED: \_\_\_\_\_

26 \_\_\_\_\_  
27 Hon. Mitchell D. Dembin  
28 U.S. Magistrate Judge